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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

DAVID W. ALLARD, JR., CHAPTER 7 TRUSTEE OF THE ESTATE OF GEORGE AND NIKKI CHOMAKOS

Petitioner,

v.

FLAMINGO HILTON,

Respondent

Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 9, 1996

50 pp

QUESTION PRESENTED

1. Did the Court of Appeals err in affirming the District Court's affirmance of the Bankruptcy Court's interpretation of the Uniform Fraudulent Conveyance Act, incorporated by section 544 of the Bankruptcy Code, 11 U.S.C. § 544, holding that gambling is an "investment" that can be fair consideration?

PARTIES TO THE PROCEEDING

There are no other parties to this proceeding besides those listed in the caption. Pursuant to Rule 29.1 of this Court, petitioner states that he is an individual, trustee in bankruptcy for other individuals, not a corporation, and that there is neither a parent nor a subsidiary.

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DAVID W. ALLARD, JR., CHAPTER 7 TRUSTEE OF THE ESTATE OF GEORGE AND NIKKI CHOMAKOS

Petitioner,

v.

FLAMINGO HILTON,

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Petition for Writ of Certiorari

To The United States Court Of Appeals

For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Petitioner, David W. Allard, Jr., Chapter 7 Trustee of the Estate of George Chomakos and Nikki Chomakos ("Petitioner"), respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit which was entered in this matter on November 13, 1995.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (1a) affirming the decision of the United States District Court for the Eastern District of Michigan is reported at 69 F.3d 769 (6th Cir. 1995). (App. 29) The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* (App. 39) is not reported. The opinion and order of the United States District Court for the Eastern District of Michigan affirming decision of the Bankruptcy Court (App. 27) is not reported. The opinion of the United States Bankruptcy Court for the Eastern District of Michigan denying the relief requested by David W. Allard, Jr. to recover as fraudulent transfers debtors' prepetition gambling losses is reported at 170 B.R. 585 (Bankr. E.D. Mich. 1993). (App. 1)

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JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was entered on November 13, 1995; the order of the Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing *En Banc* was entered on December 20, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

11 U.S.C. § 544(b) provides in pertinent part as follows:

> (b) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

The Uniform Fraudulent Conveyance Act, as adopted in Michigan, MCLA §566.12, provides in pertinent part as follows:

Sec. 3. Fair consideration is given for property, or obligation;

(a) When in exchange for such property, or obligation, as a fair equivalent therefore, and in good faith,

property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

MCLA §566.14 provides in pertinent part as follows:

Sec. 4 Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation incurred without a fair consideration.

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STATEMENT OF THE CASE

This is an appeal of a Bankruptcy Court order denying the relief requested by David W. Allard, Jr. Chapter 7 Trustee of the Estate of George Chomakos and Nikki Chomakos to recover as fraudulent transfers Debtors' prepetition gambling losses to Respondent, Flamingo Hilton Hotel ("Flamingo") under 11 U.S.C. § 544(b), and the Uniform Fraudulent Conveyance Act, as adopted in Michigan. The complaint was based upon the claim that each of the Debtors transferred monies to Flamingo by gambling and received less than fair consideration in exchange, at a time when the Debtors were insolvent.

On June 7, 1994, the United States District Court for the Eastern District of Michigan denied Petitioner's appeal from the Bankruptcy Court and affirmed the decision of the Bankruptcy Court. On November 13, 1995, the Court of Appeals for the Sixth Circuit affirmed, holding that, gambling is an "investment" that can have economic value.

Subsequently, Petitioner timely filed a petition for rehearing and a suggestion for rehearing en banc. On December 20, 1995, the Court of Appeals for the Sixth Circuit filed an order denying the petition for rehearing and suggestion for rehearing en banc.

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REASONS FOR GRANTING THE WRIT

I. The Opinion Below Conflicts With Decisions of Other Courts and Raises Important Questions Concerning the Requirements to Avoid Transfers Under the Bankruptcy Code

The opinion below, holding that gambling is a type of "investment" that satisfies the fair consideration test of fraudulent conveyance law (App. 34), conflicts with the decisions of other federal courts.

> In re Treadwell, 699 F.2d 1050, 1051 (11th Cir. 1983)(transfers made for "love and affection" were not made for fair consideration)
>
> Zahra Spiritual Trust v. United States, 910 F.2d 240, 249 (5th Cir. 1990)(transfers to charitable trust not made for fair consideration)
>
> Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995)(fair consideration not received by insolvent transferor in connection with transfers to various religious and charitable organizations)

There is no case in American jurisprudence holding that gambling by persons who are insolvent (App. 32) is an "investment." The Trustee is concerned that a Court of Appeals' opinion is going on record with such a disturbing conclusion. This decision's message to gamblers is: "If you're insolvent, it's OK to gamble away what little money you have and then file bankruptcy." Surprisingly, the Sixth Circuit is giving gambling casinos more protection than banks in cases of leveraged buyouts, see e.g. United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986). The Sixth Circuit's decision is a big mistake from a policy and jurisprudential standpoint, and is repugnant to common sense. "If the law supposes that," said Mr. Bumble, "the law is a ass, an idiot." Charles Dickens, Oliver Twist, Ch. 51.

The better view, as expressed by the cases, is that gambling does not represent an "investment." In re Nahas, 181 B.R. 930, 934 (Bankr. S.D. Ind. 1994)(no authority that a hope to win at gambling provides requisite intent to repay); Hansbury v. Citibank, 128 B.R. 320, 329 (Bankr. D. Mass. 1991)(debtor's "hope of winning big at gambling was not realistic").

The Court of Appeals also ignored controlling Michigan law, which requires the "standpoint of creditors" test. The Court of Appeals said "we are not persuaded, moreover, that we ought to evaluate the transactions at issue here solely from the standpoint of creditors." (App. 37) However, the Court of Appeals acknowledged that this case was governed by Michigan law. (App. 32) Michigan law requires the "standpoint of creditors" test. In McCaslin v. Schouten, 294 Mich. 180, 186, 296 N.W. 696 (1994), the Michigan Supreme Court held:

> What constitutes "a fair equivalent" or "fair consideration" under the fraudulent conveyance act must be determined from the standpoint of creditors. The debtor might be satisfied to give his assets to a stranger or to exchange them for some worthless chattel. But the law will not permit him to do so if he thereby renders himself uncollectible to the detriment of this creditors.

Fraudulent conveyance law protects the creditors' interest by requiring that a debtor receive an actual economic benefit that is fairly equivalent in value to the property conveyed. See In re Rodriquez, 895 F.2d 725, 727 (11th Cir. 1990) ("the provision does not authorize voiding a transfer which 'confers an economic benefit upon the debtor . . .");

Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991 (2nd Cir. 1981) ("if the giving of the consideration. . . confers an economic benefit upon the debtor, then the debtor's net worth has been preserved . . ."). In re Butcher, 58 B.R. 128, 131 (Bankr. E.D. Tenn. 1986) ("Since the transfer operated exclusively to benefit third parties without conferring any economic benefit upon the debtor, the trustee is entitled to avoid the transfer under § 548(a)(2))(A)").

Here, from the standpoint of creditors, the Chomakoses lost their money to Flamingo and received no economic value in exchange. The bankruptcy estate was depleted to the creditors' detriment. As stated by the court in In re Minnesota Utility Contracting, Inc., 101 B.R. 72, 85 (Bankr. D. Minn 1989) aff'd in part, rev'd in part, In re Minnesota Utility Contracting, Inc., 110 B.R. 414 (D. Minn. 1990):

> This is essentially a balance sheet test. If a transfer adversely affects one side of the debtor's balance sheet, then the debtor's balance sheet must reflect a consideration already received of reasonably equivalent value or the transaction must result in a change to the other side of the balance sheet of reasonably equivalent value.

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CONCLUSION

Because the Court misconstrued the law -- in particular, treating gambling by insolvent persons as a form of "investment" instead of a fraudulent transfer in accordance with section 544 of the Bankruptcy Code, incorporating the Uniform Fraudulent Conveyance Act as adopted in Michigan -- and because the Court of Appeals ignored controlling Michigan law requiring the "standpoint of creditors" test, a writ of certiorari should issue to review the decision below.

Respectfully submitted,

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February 9, 1996

In re George CHOMAKOS and Nikki Chomakos, Debtors.

David W. ALLARD, Jr., Chapter 7 Trustee of the Estate of George Chomakos and Nikki Chomakos, Plaintiff,

v.

Flamingo HILTON, Defendant.

Bankruptcy No. 90-06595-S.
Adv. No. 91-0762-S.

United States Bankruptcy Court,
E.D. Michigan,
Southern Division,

Dec. 21, 1993.

Chapter 7 trustee filed adversary proceeding against hotel casino to recover as fraudulent transfers debtors' prepetition gambling losses. The Bankruptcy Court, Walter Shapero, J., held that under totality of circumstances, debtors received reasonably equivalent value for their bets, and thus transfers were not fraudulent.

So ordered.

Chapter 7 trustee using strong arm powers to set aside transfer as fraudulent under Michigan's fraudulent conveyance statute bore burden of proving that debtor transferors failed to receive fair consideration. M.C.L.A. § 566.13.

Malcolm B. Campbell, Detroit, MI for plaintiff.

Scott M. Mahoney, Las Vegas, NV, for defendant.

OPINION
WALTER SHAPERO, Bankruptcy Judge
Background and Basic Facts

On August 2, 1990, Nikki and George Chomakos ("Debtors") filed a voluntary Chapter 11, and on September 6, 1990, an Order for Relief under Chapter 7 was entered. This adversary proceeding was brought by the Trustee against Flamingo Hilton ("Flamingo") under 11 U.S.C. § 548 and Mich. Comp. Laws Ann. §§ 566.110.23; Mich.Stat. ann. 26.881-.893 to recover gambling losses sustained by the Debtors at Flamingo.

The Trustee contends that each of the Debtors transferred monies to Flamingo by gambling and received less than reasonably equivalent value in exchange, at a time when the Debtors were insolvent or that by the transfers the Debtors were rendered insolvent.

Flamingo contends that (a) the Trustee cannot sustain his burden of proof that transfers were made by Nikki Chomakos for less than reasonably equivalent value or less than fair consideration because he is not capable of satisfactorily proving whether Nikki Chomakos was a net winner or loser on Flamingo's slot machines; and (b) even if the Trustee could show that Nikki Chomakos was a net loser, the opportunity of winning more than the amount bet and entertainment value of gambling constitute reasonably equivalent value and fair consideration; and (c) even though George Chomakos appears not to have won anything, the opportunity of winning more than the amount bet and

entertainment value of gambling constitute reasonably equivalent value and fair consideration. It is also unclear to Flamingo whether the Debtors were insolvent at the time the transfers were made and/or were rendered insolvent by such transfers.

The parties stipulated to the following facts in the Joint Final Pretrial Order:

(1) On August 2, 1990, the Debtors filed for relief under Chapter 11 of the Bankruptcy Code.

(2) On September 16, 1990, an order for relief under Chapter 7 was entered.

(3) The Trustee is the representative of the bankruptcy estate of the Debtors.

(4) The Trustee has standing to seek recovery of fraudulent transfers pursuant to 11 U.S.C. § 548 and Mich.Comp.Laws Ann. §§ 566.11-566.23.

(5) Nikki Chomakos gambled in Flamingo's casino at its slot machines.

(6) Nikki Chomakos and Flamingo's employees signed Flamingo Hilton's Survey of Certain Gaming Transactions forms whereby Nikki Chomakos declared losses of $3,000 on June 15, 1989, $6,000 on June 16, 1989 and $5,000 on September 11, 1989.

(7) Nikki Chomakos signed W-2G forms declaring winnings of $2,000 on June 15, 1989, $5,000 on June 16, 1989 and $2,000 on September 11, 1989 at Flamingo's slot machines.

(8) George Chomakos lost an estimated $900 on July 1, 1987 gambling at Flamingo.

(9) George Chomakos lost an estimated $100 on November 1, 1987 gambling at Flamingo.

(10) George Chomakos lost an estimated $600 on January 4, 1988 gambling at Flamingo.

(11) George Chomakos lost an estimated $600 on June 20, 1988 gambling at Flamingo.

(12) George Chomakos lost an estimated $1,400 on June 12, 1989 gambling at Flamingo.

(13) George Chomakos lost an estimated $110 on April 29, 1990 gambling at Flamingo.

(14) The Complaint shall be deemed amended to allege and seek the recovery of the following transfers and/or conveyances by George Chomakos to Flamingo for less than reasonably equivalent value at a time when Debtors were insolvent and/or such transfers caused the Debtors to become insolvent:

(a) $900 on July 1, 1987,
(b) $100 on November 1, 1987,
(c) $600 on January 4, 1988,
(d) $600 on June 20, 1989,
(e) $1,400 on June 12, 1989, and
(f) $110 on April 29, 1990.

(15) Defendant is the holder of a nonrestricted gaming license issued by the State of Nevada and Nikki Chomakos' playing of Flamingo's slot machines and George

Chomakos' gaming constituted legal transactions in the State of Nevada.

The referred to winnings and losses in tabular form are attached hereto as Exhibit A.

Law and Discussion

Plaintiff is not specific in its pleadings as to whether it is relying on Bankruptcy Code § 548(a)(1) or § 548(a)(2)(A) and (B). Given the proofs and arguments, however, it is apparent that if Plaintiff is to prevail, it can only do so by relying on § 548(a)(2)(A) and (B)(i) as his Code cause of action.[1] These sections (and the relevant provisions of the analogous Michigan fraudulent conveyance law hereinafter referred to) require no proof of actual intent to hinder, delay or defraud creditors. Rather these sections concern avoidable transfers which are considered to be "constructively" fraudulent when the debtor:

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[1] 11 U.S.C. § 548(a)(2)(A) and (B)(i) state,

§ 548. Fraudulent transfers and obligations (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of filing of the petition, if the debtor voluntarily or involuntarily--

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation, and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(a) transfers interests within one (1) year of the filing date of September 6, 1990;

(b) is or becomes insolvent on the date of transfer; and

(c) receives less than equivalent value in exchange for the transfer.

These factors comprise the basic elements of required proof under §548(a)(2)(A) and (B).

It should be likewise noted the Plaintiff is not specific as to which sections of the Michigan Uniform Fraudulent Conveyance Act he is proceeding under--making just a general reference to Mich.Stat.Ann. §§ 26.881-.893/ Mich.Comp.Laws Ann. §§ 566.11-566.23. As was noted in reference to the § 548 action, the proofs and arguments are such that Plaintiff must and can only be relying on Mich.Stat.Ann. § 26.884/Mich.Comp.Laws Ann. § 566.14 (and Mich.Stat.Ann. §§ 26.882; 26.883/Mich.Comp.Laws Ann. §§ 566.12; 566.13 for the definitions of "fair consideration" and "insolvency" terms contained therein).[2]

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[2] Mich. Comp. Laws Ann. 566.14 Mich. Stat. Ann. 26.884 states,

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

Mich.Comp.Laws Ann. 566.12/Mich.Stat.Ann. § 26.882 states,

> (1) A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

The insolvency requirements exist under both statutes. The state statute however does not have the one (1) year limitation contained in the Code. In this case, all of the transfers made by Nikki Chomakos occurred within the one (1) year of the filing. George Chomakos, however, only made one transfer (involving $110) within one (1) year of the filing.

If the Court finds that the transfers were made for less than "reasonably equivalent value" then the Trustee must prove that the Debtors were insolvent. *In re Minnesota Utility Contracting, Inc.*, 101 B.R. 72, 79 (Bankr.D.Minn. 1989). The Court will nevertheless discuss the insolvency issue first.

In the case of *In re Otis & Edwards, P.C.*, 115 B.R. 900 (Bankr.E.D. Mich. 1990), the court held that the burden of proving lack of insolvency (i.e. solvency) shifts to the transferee if the Trustee proves a lack of fair consideration. *Id.* at 911. That holding on the burden of proof question was premised on the fact it was more onerous for the Trustee to establish the value of the assets and liabilities than the

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Mich.Comp.Laws Ann. 566.13/Mich.Stat.Ann. § 26.883 states,

> *Fair consideration.* Sec. 3. Fair consideration is given for property, or obligation;
>
> (a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
>
> (b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not proportionately small as compared with the value of the property or obligation obtained. (MCL § 566.13; CL 29, § 13394.)

transferee. *Id.* In *Otis & Edwards, P.C.*, the question concerned the value of the transferee's own law practice, and it made sense that the transferee should have to prove its value. Requiring the transferee to prove solvency in this case, a case involving an out-of-state casino, would require the casino-transferee to develop extensive knowledge of the assets and liabilities of the Debtors who, at the time the transactions took place, were strangers to the casino. Therefore, the burden should not shift, and the Trustee should have to prove insolvency.

The Trustee does not appear to be certain when insolvency occurred. The Trustee's view at trial was that the Debtors became insolvent by January 1988. The Trustee's earlier interrogatory answer was that insolvency occurred by November 1988.

The evidence establishes that the Chomakos' were in fact insolvent from at least January 1988. (Pretrial Order p. 15-16.) It is unclear, however, whether the Debtors were insolvent prior to January 1988. Therefore, because the Trustee has the burden of proving insolvency and because he did not prove that the Debtors were insolvent prior to January, 1988, the Debtors should be deemed insolvent as of January, 1988, and thus solvent prior to that time.

Before specifically addressing the remaining issues, this Court must determine how much Nikki and George Chomakos' losses exceeded their winnings in order to determine how much money can be, potentially, recovered. Flamingo does not dispute Nikki Chomakos' indicated winnings of $9,000 as reported to the IRS. Flamingo does dispute, however, that the indicated winnings constitute the full extent of Nikki Chomakos' winnings. Because only jackpots over $1,200 need to be recorded on W-2G forms and

because the machines played by Mr. Chomakos offered various jackpots or payouts below $1,200 (Trial transcript, p. 70-71), Flamingo's Mr. Shay asserts that it is very probable that Ms. Chomakos hit several smaller jackpots and walked away with the money. (Trial transcript, p. 71). Therefore, Nikki Chomakos could have winnings totalling much more than the above listed $9,000. Flamingo, however, did not present any evidence or testimony supporting the allegations that Nikki Chomakos won more than $9,000. Therefore, this Court values here winnings at $9,000.

The Trustee alleges Nikki Chomakos sustained loses sufficient to show that she received less than "reasonably equivalent value." The Trustee bases his opinion upon the Survey of Certain Gaming Transaction Sheets which lists losses. These forms are signed by an employee and contain a statement confirming that the employee observed the customer play the game on the date which the debtor claims to have lost the recorded amount. The Surveys listed the indicated losses of $14,000 for Nikki Chomakos. Her net gambling losses were $5,000.

George Chomakos, unlike Nikki Chomakos, has no recorded winnings. George Chomakos did, however, lose money at Flamingo, Flamingo's own computer records and admissions demonstrate that George Chomakos suffered gambling losses of $3,710, of which $1,000 were incurred prior to January of 1988 and thus not subject to avoidance. Therefore, George Chomakos' net gambling losses total $2,710 after January of 1988.

Flamingo, however, disputes the amounts the Debtors claimed as gambling losses. Flamingo asserts that the losses are likely to be inaccurate for three reasons. First, the Survey sheets which are provided to customers by Flamingo for

reporting losses contain a disclaimer which provides ". . . The declaration of loss is by the customer and this establishment does not confirm or verify that information." Therefore, the Survey Forms alone should not be deemed sufficient to establish by a preponderance of the evidence that the Chomakos' sustained gaming losses. Second, customers have a motive to be untruthful since losses are offset against winnings for income tax purposes. Third, the Chomakos' credibility is questionable because Nikki Chomakos admitted that she and her husband face contingent common law and statutory fraud liability for allegedly fraudulent statements made to obtain a loan.

Recognizing the problems of compiling an accurate accounting, it appears likely that the Chomakos' had $9,000 in total winnings and $16,710 in total losses based on the available evidence and testimony. Whether or not the Chomakos net loss of $7,710 should be considered in toto or should be broken down by specific date in order to determine what can be recovered need not be considered at this point.

[1,2] Under §548, the Trustee may set aside a transfer of the debtor's property if the debtor received less than "reasonably equivalent value" for the property. To set aside a transfer under the cited provisions of the Michigan Uniform Fraudulent Conveyance Act, the Trustee bears the burden of proving the transferors failed to receive "fair consideration". *In re Otis & Edwards, P.C.*, 115 B.R. at 907. Receiving less than "fair consideration" under the Michigan statute is properly considered to be essentially the same as receiving less than "reasonably equivalent value" under § 548. *Id.* at 908; *In re Bates*, 32 B.R. 40, 41 (Bankr.E.D.Cal. 1983); *In re Curtina Int'l, Inc.*, 23 B.R. 969, 974 (Bankr.S.D.N.Y. 1982).

[3] Determining whether the debtor received reasonably equivalent value requires two somewhat separate inquiries: (1) was there a receipt of what may properly be considered "value", and if there was, (2) was that value "reasonably equivalent" to what was transferred. (In this case, the Debtors transferred the indicated sums placed in the slot machines and placed on the blackjack tables on the indicated dates.)

[4] The cases tend to search for "economic benefit" as the key ingredient of "value". *See In re Ohio Corrugating Co.*, 91 B.R. 430 (Bankr.N.D.Ohio 1988); *In re W.E. Tucker Oil Co., Inc.*, 55 B.R. 78, 81 (Bankr.W.D.Ark. 1985); *In re Cottrill*, 118 B.R. 535 (Bankr.S.D.Ohio 1990). Courts have also considered indirect economic benefit as value. Indirect benefit occurs when the benefit goes directly to a third party with whom the debtor is related. *See e.g., Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 19810; *In re Consolidated Capital Equities Corp.*, 143 B.R. 80 (Bankr.N.D.Tex. 1992).

While not without opposing viewpoints, it would also seem that executory promises (other than promises for support specifically excluded from the definition of value in §548(d)(2)(A)) constitute value. Whether the receipt of services may further constitute "value" is also disputed. Many courts find that the receipt of services constitutes value. *See e.g. In re Cottrill*, 118 B.R. at 537-538; *In re Universal Clearing House Co.*, 60 B.R. 985, 998 (Bankr.D.Utah 1986); *In re Moses*, 59 B.R. 815, 818 (Bankr.N.D.Ga. 1986); *In re Missionary Baptist Foundation of America, Inc.*, 24 B.R. 973, 979 (Bankr.N.D. Tex. 1982). It has also been stated that "the requirement of economic benefit to the debtor does not demand consideration that replaces the transferred property with money or something else tangible or leviable that can be

sold to satisfy the debtor's creditor's claims." 2 David G. Epstein, et al., *Bankruptcy*, § 6-49, p. 23 (1992).

However, the court in *In re Young*, 148 B.R. 886 (Bankr.D.Minn. 1992) aff'd 152 B.R. 939 (D.Minn. 1993) found that an exchange of intangibles for money was not a transfer of "reasonably equivalent value." In *Young*, the debtor donated money to his church in exchange for the satisfaction of his moral obligation to tithe and for the use of the services offered by the church. The present case is distinguishable from *Young* because the debtor in *Young* could take advantage of the services the church offered whether or not he contributed while the debtor in the instant case could only gamble if he paid for the right. *See also In re Dondi Financial Corp.*, 119 B.R. 106 (Bankr.N.D.Tex. 1990) (fair consideration means substantive value that is reasonable in view of the surrounding circumstances, and/or consideration that is not "so far short of the real value of the property as to startle a correct mind or shock the moral sense.")

Comments referring directly to the Uniform Fraudulent Conveyance Act made in Alces, *Law of Fraudulent Transactions*, § 502(2)(b)(i), p. 5-59 (Warren, Gorham & Lamont 1989) also illustrate the difficulty in determining what constitutes reasonably equivalent value:

> The UFCA definition of fair consideration does not require absolute equivalence between the property the grantor gives up and what he receives in return; there is room for some inequality, hence, the "fair" equivalence standard. The purpose for the flexibility in the definition is to assure that fraudulent disposition law will not have too great a chilling effect on commercial transactions. Absolute equivalence would

> be difficult to establish, and recognizing the integrity of transactions when there is less than absolute equivalence but still a fair equivalence provides an accommodation of the interests implicated, a balance between the need to permit transactors to make deals, some good and some not so good, and the need to fix a point beyond which courts will not permit grantors to enter into transactions that will too profoundly impair their ability to discharge obligations to creditors.
>
> To capture and apply the spirit of the fair equivalence standard, the courts have developed a catalog of tests by which the equivalence is to be measured to determine whether it is fair. The tests focus on ways to balance prejudice to the grantor's creditors against society's interest in maintaining the integrity of commercial transactions (citing cases.)

The ramifications of the foregoing will become clearer after a review of other authorities on the subject, in relation to the facts in this case.

In terms of the overall inquiry, case law presents no specific test for determining whether "reasonably equivalent value" is exchanged. *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990) ("the courts have considered a number of standards to be applied" in determining the meaning of "reasonably equivalent value.") Older case law defining "reasonably equivalent value" applies a mathematical formula as a benchmark for such determination, establishing specific guidelines for what is and what is not "reasonably equivalent value." *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (any transfer for less than 70% of market value of the property is

per se not reasonably equivalent value). This rigid test has been rejected by most courts. *In re Bundles*, 856 F.2d 815, 823-24 (7th Cir. 1988).

Even if this Court applied the mathematical test, Nikki Chomakos may still have received reasonable equivalent value. Considering what Nikki Chomakos won on June 15 and June 16, 1989 (and considering the two-days activities to be a single transaction) in relation to what she expended, she received in excess of seventy (70%) percent of the value she transferred which, without realizing any other consideration received, is well within the seventy (70%) percent rule above noted and applied by some courts in determining reasonable adequacy.

As to the seventy-percent rule, it has been noted:

> Yet, the 70 percentage figure is not mechanically controlling in any kind of case. Reasonable equivalence may be lacking when more than 70% is paid, and may be present when the debtor gets less than 70% of the transferred property's value. Moreover, the percentage paid, though very important, is not itself always controlling. Rather, it is properly considered in combination with all of the other facts surrounding the transfer in determining the ultimate issue which is whether, in light of the particular circumstances of the case, the debtor got a fair economic exchange.

2 Epstein, et al., *Bankruptcy*, §6-49, p. 37.

[5] The trend followed by many of the circuit courts in their more recent decisions is to consider all of the facts of a case in order to determine if reasonably equivalent

value is given in exchange for a transfer. *See In re Morris Communications NC, Inc.*, 914 F.2d at 467.[3] The *Morris* court stated, specifically,

> Factors to be considered include the good faith of the trustee, the relation differences in the amount paid compared to the fair market value, and the percentage of the amount paid is of the fair market value . . . [and] whether the sale was an arm's length transaction between a willing buyer and a willing seller.

Id.

The Trustee rejects any test based on a fact specific analysis inquiry and, instead, argues for the application of a narrower view involving two tests for determining whether the exchange was for "reasonably equivalent value." The first requires viewing the adequacy of consideration primarily from the creditors' standpoint. *In re Anderson, Industries, Inc.*, 55 B.R. 922, 927 (Bankr.W.D.Mich 1985); *In re Dondi Financial Corp.*, 119 B.R. 106 (Bankr.N.D.Tex. 1990); *McCaslin v. Schouten*, 294 Mich. 180, 186, 292 N.W. 696, 699 (1940).

Accepting the concept that the transactions in question should be considered from the creditor's standpoint does not perforce require acceptance of the Trustee's position. Actually, when one considers the periods of time involved, viewing each of the transactions separately and noting the

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[3]*See also, In re Bundles*, 856 F.2d at 824; *In re McConnell*, 934 F.2d 662 (5th Cir. 1991) (court does not state rule of law but considers all of the facts surrounding the transfer.) *In re Otis & Edwards, P.C.*, 115 B.R. at 909-910; *In re Young*, 152 B.R. at 945.

periods over which they occurred in light of both the winnings and the magnitude of the amounts bet and the losses incurred on each separate occasion, a fair argument can be made that the direct and indirect receipts could amount to fair or adequate consideration which does not "startle the correct mind nor shock the moral sense." *In re Dondi Financial Corp.*, 119 B.R. at 109. More importantly the *quid pro quo* was established in the context of a state regulated business, existing in an open, competitive marketplace responding and responsive to desires of legitimate tourists pursuing and engaging in a legal and legitimate pursuit. Indeed, one could fairly argue that in such circumstances the "fairness" or "reasonable equivalence" requirements ought to be considered as perforce satisfied. In the end, however one must concede that the lack of a more quantifiable "economic benefit" may be the strongest link in the Trustee's argumentative chain in this case--but the strength of the other links must be considered as well.

Viewing the adequacy of consideration primarily from the creditors' standpoint is a problematic test for at least two reasons. First, various creditors may have different ideas about what constitutes adequate consideration. For example, low priority unsecured creditors who are expecting little from the bankruptcy estate may want the debtor to take more risks to earn money than creditors with a higher priority. Second, consideration can exist even if debtors expend money in ways which do not benefit creditors. For instance, if the debtors treated themselves to $250 meals each day for a month, their estate would be depleted by $7,000 but consideration would still be present.

The second test the Trustee advocates, the balance sheet test, requires that "the value of the benefit received by the debtor approximate the value of the property or obligation

he has given up." *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d at 994; *In re Rodriguez*, 895 F.2d 725 (11th Cir. 1990); *In re Butcher*, 58 B.R. 128 (Bankr.E.D.Tenn. 1986); *Minnesota Utility Contracting, Inc.*, 101 B.R. 72 (Bankr.D.Minn. 1989) *aff'd in part, rev'd in part on other grounds, In re Minnesota Utility Contracting Inc.*, 110 B.R. 414 (Bankr.D.Minn. 1990). This test has been applied primarily in cases where tangible goods have been exchanged. However, in cases where intangible benefits are gained, such as the potential to earn more money than expended, the balance sheet test has not been used. *See, In re Morris Communications NC, Inc.*, 914 F.2d 458 (4th Cir. 1990).

It is indeed difficult to reconcile the following statements on the one hand, (1) the questioned transaction must be looked at from the point of view of the creditor, (2) the basic question is whether or not the transactions rendered the transferor "judgment proof", or (3) what should be emphasized is what the Debtor obtained, not what the transferee gave up, with the more expansive view hereinbefore referred to on the other hand. At one level, these seemingly contradictory tests can be reconciled by pointing to the fact, true in many cases, that the narrower views were set forth in factual situations where the result seemed obvious such as where an individual transferor transforms individually held property into entireties property thus putting it beyond the reach of creditors with literally no benefit as such accruing to the transferor other than to place property beyond the reach of creditors. This Court believes that, in this case, the proper perspective is that which tries to take into account all of the facts.

Accepting the totality of the circumstances test requires consideration of factors set forth in the cited *Morris*

Communications and *Otis & Edwards, P.C.* cases, as well as other relevant considerations to be noted.

(i) Were the transactions conducted at arms-length?

[6, 7] The Trustee argues that the gambling transactions were not at arms-length because the Chomakos' did not occupy an equal bargaining position with Flamingo because Flamingo alone set the pay-back percentage and the rate at which a gambler was expected to lose money. This Court finds that an "arms length" transaction does not require equality of bargaining power (if that could ever be measured in any meaningful way). Rather it involves (a) actions of essentially unrelated willing parties, each being relatively free to act in what each perceives to be his or her own self-interest, (b) actions which are voluntary (as opposed to being under compulsion or duress), and (c) actions which generally take place in an open market. Blacks's Law Dictionary 57 (5th ed. 1983). The Debtors understood the type of transaction which occurs at a casino and voluntarily placed bets and played the slot machines. No proof has been offered that Debtors were acting under duress or were in some way deprived of their free will to the point where the principles of general contract law would permit them to avoid their transactions on these grounds. The activities involved took place in an essentially open market place, and the perceived self-interest of each of the parties obviously drove their participation and involvement. Therefore, this Court concludes that the gaming transactions occurring between the Debtors and Flamingo were conducted at arms-length.

(ii) Was property or value transferred to the debtor?

[8] Gambling is, arguably, an "investment" that can have economic value, albeit one that may entail what many view as an unacceptably high risk. The Debtors received the chance to win more money than they wagered.[4] They also received whatever psychic and other intangible values are attendant to being at Flamingo's establishment and gambling.

The Fourth Circuit in the *In re Morris Communications NC, Inc.* case was presented with the question as to how a court should quantify the value of a risky investment. In *Morris*, the property in question was a 26% stock interest in a corporation whose sole asset was a cellular telephone license application. *Id.* at 460. At the time of the transfer, the application had no present value; "it was merely a right to participate along with 21 other applicants in the award of the nonwireline cellular license for the Charlotte-Gastonia SMSA through the 'rolling of the dice' in the lottery." *Id.* at 468. The court in *Morris* did not focus on whether a lottery chance had any value, but instead concentrated on determining the fair market value of the chance. *Id.* at 460. In other words, the court held that risky

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[4]For example, at blackjack, the gambler has a chance to win $1.00 for every $1.00 wagered, or to win $1.50 for every $1.00 wagered for a hand of "blackjack". (Trial transcript, p. 57-58). On slot machines, players can win substantial jackpots, potentially millions of dollars, on a $3.00 investment (Trial transcript, p. 61). On two of the three machines which Hilton can identify Ms. Chomakos as having played based on her W-2G forms, the player could win as much as $8,000 on a $10.00 wager, and on the third machine, the player could win as much as $5,000 on a $15,00 wager.

investments can have economic value but left courts with the task of determining the extent of that value.

(iii) Whether the debtor received additional valuable benefits as a result of the transaction?

Debtors arguably received additional valuable benefits as a result of the transaction in the form of entertainment value, i.e.: the Debtors apparently enjoyed the excitement of gambling at the Flamingo.

[9] The Trustee has two counter arguments. The first is based on the "creditors' standpoint" and "balance sheet" tests for determining "reasonably equivalent value." Since this court has rejected those tests, the Trustee's arguments based on those tests fail, too.[5] Second, the Trustee argues, that because Flamingo has a house advantage on blackjack and retains a percentage of the money deposited in its slot machines, the 'chance' to win money actually represents an expectation of losing money and has no economic value. The second argument is also unpersuasive in light of the fact that gambling is a legal and regulated industry.

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[5]The Trustee argues that the debtor received no property rights or tangible assets or rights to benefit the creditors referring to principles recited in such cases as, *In re Young*, 152 B.R. 939 (D. Minn. 1993) (debtors did not receive reasonably equivalent value for their voluntary church contributions) and *In re Dondi Financial Corp.*, 119 b.R. 106 (Bankr.N.D.Tex. 1990) ("what constitutes a fair consideration under the Uniform Fraudulent Conveyance Act must be determined from the standpoint of creditors . . . whether the debtor's estate has been unfairly diminished by his conveyance").

Flamingo's argument is that Debtors received additional valuable benefits as a result of the transaction in the form of entertainment value. The Debtors' entertainment options are broadened by taking a Las Vegas vacation because gambling revenues subsidize other items such as:

(a) relatively inexpensive hotel rooms ($50-$52 per night);

(b) Broadway quality shows at ticket prices of$18 (as compared to a $65 or $100 price in New York);

(c) inexpensive lavish food buffets;

(d) available shopping;

(e) various and sundry tours and opportunities to participate in golf, swimming, skiing and other sports and sightseeing in the area; and

(f) last but not least, of course, the "opportunity" to gamble and make money doing so.

However, a problem with this argument is that both the gambler and non-gambler can receive those other things, so in that sense the Debtors did not receive anything in Las Vegas that they would not have received had they not gambled.

(iv) Did "good faith" exist in the transactions involved?

[10, 11] The concept of good faith is specifically part of the inquiry under Michigan law. *See* Mich.Comp.Laws Ann. § 566.13; Mich.Stat.Ann. § 26.883. The *Morris* court explicitly considered it as likewise and necessarily involved in an inquiry under § 548. The primary orientation on this point is whether the *transferee* knowingly participated in acts or as part of a plan to hinder or defraud creditors. A "yes" answer would be yet another reason to avoid the transaction. A "no" answer should be a factor for not doing so. There is no proof here that Flamingo had any knowledge of what the Debtors' financial situation might have been at the various times the gambling occurred. It is unwarranted to indulge in any presumption that all persons who gamble in Las Vegas are, or are thereby rendered, insolvent or intend to defraud their creditors (and from that conclude that the casinos are perforce knowing participants in a scheme to defraud). The fact that Debtors continued to gamble and/or returned for future visits cannot be considered a sufficient basis for a finding of collusive participation in any scheme to avoid Debtors' creditors. What Flamingo received from Debtors was not measurably beyond the consequences of Debtors' natural relationship with Flamingo nor did Flamingo receive or obtain some greater advantage for itself, above and beyond that which naturally results from that relationship. For better or for worse, Flamingo was acting in its customary way consistent with the business it was in.[6] There is insufficient evidence that the Debtors

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[6]See *Downing v. Brooks*, 194 Mich. 490, 493, 160 N.W. 543, 544 (1916) where in a different factual context the court adopted the lower court's opinion, which referred to the fact that the transferee' was

gambling activities involved such amounts or were engaged in with such frequency as would support a conclusion that Flamingo was acting in bad faith. Therefore, whatever one might think of Flamingo's business or its patrons, one must conclude it was acting in good faith in this situation, even granting that in one sense it is in the business of exploiting what some might consider human weaknesses with a possible result that potentially bodes ill for the creditors of some of its many patrons.

Conclusion

[12] As is obvious, the facts of this case do not fit the usual mold of fraudulent conveyance cases. From the point of view of creditors, a debtor who spends money gambling is in essence making what is for all intents and purposes a gift to whomever profits by the establishment's operation in order to satisfy the debtors essentially noneconomic psychological desire(s) and for which the debtor receives nothing the law should recognize as being of any cognizable (let alone "fair") value. Rather, the argument goes, the emphasis should be on the net effect on the debtors' assets available to satisfy creditors' claims. On the other hand, this case is no different from the debtors taking their family to a posh (and arguably overpriced) non-gambling resort where they spend many thousands of dollars over a short period of time on room, food, entertainment, golf, excursions, etc. (and one of those trips may have immediately preceded the bankruptcy filing). In such instances, while there was a *quid pro quo*, surely it was not an "economic" benefit to the Debtor-transferor. (Indeed, in one sense there is a greater potential "economic" benefit realizable in

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acting in the customary way and in line with its business."

gambling than in spending that same money on an expensive vacation.) What appears to be more important is that it was an arms-length ordinary course of "business" type of activity being engaged in by both transferor and transferee, or if not ordinary course, it involved a non uncommon activity which cannot be considered so abnormal, unforeseeable or outrageous as to require a different result. As was noted in the cases involving contributions to churches, while no fraudulent intent as such existed, it was also true that no so-called "badges of fraud" existed either. Gambling was and is a legal and regulated business in Nevada. Legal and regulated gambling is spreading across the country in various forms and shows signs of being more and more pervasive as its potential for profit to private enterprise and governments, becomes more apparent. It is also available in free standing forms which are not directly involved with a hotel or similar establishment that also offers food, entertainment and other amenities. Much money is also being spent by vast numbers of the public in state lotteries. Indeed it is possible, even likely, that the money spent and lost in those lotteries is relatively greater (when measured against the individual lottery players' income, assets, liabilities or net worth) then the money lost in this case. Should state lotteries operate at the risk of being recipients of fraudulent conveyances? To conclude that Flamingo is liable in this case would be, in this Court's view, to conclude that each casino and lottery operator (and maybe even the above-mentioned resort) is in reality a protector of the creditors of its customers, to the point that to protect themselves they must continuously inquire and be sufficiently knowledgeable as to the financial circumstances of each of its patrons so that they can, in light of the knowledge this obtained, refuse access to certain of those patrons. As a general proposition, that would tip the scales inordinately in favor of creditors and do excessive harm to society's interest in maintaining the integrity of legal

and commercial transactions and thereby do violence to the real intent and concepts underlying § 548 and the Michigan Fraudulent Conveyance Act. This Court is unaware of any pervasive statutory or public interest requirement in fraudulent conveyance cases that a transferee should be considered as the transferor's creditors keeper.

The foregoing is stated with particular attention to the facts of this case: i.e. that one debtor while incurring a net loss had substantial winnings from gambling which occurred on two separate occasions, fifteen and twelve months prior to the bankruptcy filing, and, the other debtor's questioned gambling losses took place on six separate occasions during a thirty-eight month period prior to the bankruptcy filing date.

One could readily conjure up a situation where a "high roller", whose financial situation is well known, gambles at a casino one or two times shortly before filing bankruptcy and loses an inordinately large amount of money. That factual situation, or something much more akin to it then this one, contains the seeds of a possibly different result. By concluding in this case that the relief requested should be denied, the Court does not thereby intend to insulate as a matter of law all legal gambling transactions from the reach of creditors.

The Court's conclusion is therefore that the relief requested should be denied because, when weighed in their totality, the facts and circumstances of this case (and regardless of, and without resting the decision on any failure of any party to meet its particular burden of proof) dictate such a result.

Flamingo shall prepare an order consistent with this Opinion.

EXHIBIT A

Gambling Losses and Winnings
(Bankruptcy Ch. 7 Order for Relief Date - 9/6/90)

Nikki Chomakos

Date(s)	Amounts Gambled	Winnings	Net Winnings/(Losses)
6/15/89	$3,000	$2,000	($1,000)
6/16/89	$6,000	$5,000	($1,000)
9/11/89	$5,000	$2,000	($3,000)
Subtotal(s)	$14,000	$9,000	($5,000)

George Chomakos

Date(s)	Amounts Gambled	Winnings	Net Winnings/(Losses)
7/1/87	$900	-0-	($ 900)
11/1/87	$100	-0-	($ 100)
1/4/88	$600	-0-	($ 600)
6/20/88	$600	-0-	($ 600)
6/12/89	$1,400	-0-	($ 1,400)
4/29/90	$100	-0-	($ 110)
Subtotal(s)	$3,710		($ 3,710)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Civil Action No. 94-70413
GEORGE CHOMAKOS and NIKKI CHOMAKOS,	HON. HORACE GILMORE
Debtors.	Bankruptcy No. 90-06595-G Adv. Pro. No. 91-0762 Chapter 7 Proceedings HON. WALTER SHAPERO

_____/

DAVID W. ALLARD, JR., Chapter 7 Trustee of the estate of George Chomakos and Nikki Chomakos,

Appellant,

v.

FLAMINGO HILTON,

Appellee.

_____/

ORDER AFFIRMING
JUDGMENT OF BANKRUPTCY COURT

ORDER AFFIRMING
JUDGMENT OF BANKRUPTCY COURT

At a session of said Court, held in the
U.S. Court House, Detroit, Michigan on
June 7, 1994

Present: Hon. /s/ Horace W. Gilmore
United States District Court Judge

This matter having come before the Court upon Appeal of the Bankruptcy Court's Judgment ordered January 24, 1994;

The Court, having reviewed the parties' papers, having heard oral argument thereon, and being otherwise fully informed in the matter;

IT IS HEREBY ORDERED, for the reasons stated on the record, that the judgment of the Bankruptcy Court is AFFIRMED.

So ordered.

ENTERED BY ORDER OF THE COURT
/s/ Horace W. Gilmore

IN RE CHOMAKOS
Cite as 69 F.3d 769 (6th Cir. 1995)

In re George CHOMAKOS and Nikki Chomakos, Debtors.

David W. ALLARD, Jr., Chapter 7 Trustee of the Estate of George Chomakos and Nikki Chomakos, Appellant,

v.

FLAMINGO HILTON, Appellee.

No. 94-1712.

United States Court of Appeals,
Sixth Circuit.

Argued Sept. 14, 1995.

Decided Nov. 13, 1995.

Chapter 7 trustee sought to recover, as fraudulent transfers, prepetition gambling losses from operator of state-regulated casino. The Bankruptcy Court, Walter Shapero, J., 170 B.R. 585, found for casino. On appeal, the United States District Court for the Eastern District of Michigan, Horace W. Gilmore, Senior District Judge, affirmed. Trustee appealed. The Court of Appeals, David A. Nelson, Circuit Judge, held that debtors received reasonably equivalent value for their bets, and thus transfers were not fraudulent.

Affirmed.

Sheldon S. Toll (argued and briefed), Honigman, Miller, Schwartz & Cohn, Detroit, MI, for David W. Allard, Jr.

Scott N. Mahoney (argued and briefed), Las Vegas, NV, for Flamingo Hilton.

Before: NELSON, RYAN, and McKAY,* Circuit Judges.

DAVID A. NELSON, Circuit Judge.

This is a bankruptcy case in which the trustee sought to recover pre-petition gambling losses from the operator of a state-regulated casino. The casino operator contended that the opportunity for the debtors to win more than the sums they bet, coupled with the entertainment value that the casino provided its customers, constituted "reasonable equivalent value" and "fair consideration" for the bets at issue. The bankruptcy court accepted this contention and held that the bets were not voidable under the Bankruptcy Code or under the Uniform Fraudulent Conveyance Act. The district court affirmed the bankruptcy court's decision on appeal. We shall affirm the affirmance.

I

The debtors, George and Nikki Chomakos of Rochester, Michigan, filed a bankruptcy petition on August 2, 1990, after having lost several thousand dollars at a casino operated by Flamingo Hilton Corporation in Las Vegas,

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* The Honorable Monroe G. McKay, United States Circuit Judge for the Tenth Circuit, sitting by designation.

Nevada. The petition sought relief under Chapter 11 of the Bankruptcy Code, but the matter was soon converted into a Chapter 7 case. The trustee in bankruptcy subsequently commenced an adversary proceeding against Flamingo in the United States Bankruptcy Court for the Eastern District of Michigan.

The trustee's complaint alleged that Mr. and Mrs. Chomakos had been insolvent for six years prior to the filing of the petition; that during this time Nikki Chomakos transferred various sums to Flamingo for the purpose of gambling; that she made some of these transfers during the year preceding the filing; and that she did not receive a reasonably equivalent value or fair consideration in exchange. The complaint was subsequently amended to allege that George Chomakos had also made losing bets at the casino while insolvent. Invoking 11 U.S.C. § 548(a), the trustee sought to recover under that section losses incurred during the year preceding the bankruptcy filing. Under Mich. Comp. Laws 566.11 *et seq.*, Michigan's version of the Uniform Fraudulent Conveyance Act, the trustee sought to recover losses incurred throughout the entire six-year period in which Mr. and Mrs. Chomakos were alleged to have been insolvent.

The case went to trial, and the bankruptcy court found that the debtors should be deemed to have been insolvent from and after January of 1988; that at various times in June and September of 1989 Nikki Chomakos won a total of $9,000 playing slot machines at the Flamingo casino, while losing a total of $14,000; and that George Chomakos lost a net amount of $2,710 at the casino after January of 1988 and before the filing the petition. The combined net losses of the two debtors during the period when they were insolvent came to $7,710.

In an opinion published as *In re Chomakos*, 170 B.R. 585 (Bankr. E.D.Mich. 1993), the bankruptcy court (Shapero, J.) held that the relief requested by the trustee should be denied because defendant Flamingo gave reasonably equivalent value in exchange for the debtors' money. The order denying relief was appealed to he district court. That court affirmed the decision on the basis of Judge Shapero's opinion, and the trustee filed a timely notice of appeal.

II

[1] Under the fraudulent transfer section of the Bankruptcy Code, the trustee may undo as constructively fraudulent any property transfer made by the debtor within one year before the filing of the petition if the debtor was insolvent on the date of the transfer and "received less than a reasonably equivalent value in exchange for [the] transfer. . . ." 11 U.S.C. § 548(a)(2)(A) and (B)(i).[1] "Value" is defined as "property, or satisfaction or securing of a present or antecedent debt of the debtor. . . ." 11 U.S.C. §548(d)(2)(A).

Under Michigan's Uniform Fraudulent Conveyance Act, to which Flamingo does not deny it is subject, a conveyance made by one who is insolvent is fraudulent as to creditors if made without a fair consideration. Mich. Comp. Laws 566.14. "Fair consideration" is given for property, Mich. Comp. Laws 566.13 provides, "[w]hen in exchange for such property . . . as a fair equivalent therefor, and in good

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[1]None of the other grounds for avoidance set forth in § 548--that the transfer was made with actual intent to hinder, delay or defraud creditors, *e.g.*, see § 548(a)(1)--is asserted by the trustee here.

faith, property is conveyed or at antecedent debt is satisfied. . . ." The Michigan statute does not have a time limit corresponding to that in the Bankruptcy Code; the two provisions are substantially the same otherwise.

[2] The point in time as of which we must determine whether Mr. and Mrs. Chomakos received property of reasonably equivalent value in exchange for the money they wagered at the casino is the point at which their bets were placed. See *In re Morris Communications NC, Inc.*, 914 F.2d 458, 466 (4th Cir. 1990), quoting *Collier on Bankruptcy* § 548.09 at p. 116 (15th ed. 1984) as follows:

> "The critical time is when the transfer is 'made.' Neither subsequent depreciation in nor appreciation in value of the consideration affects the . . . question whether reasonable [sic] equivalent value was given."

[3] Where gambling is lawful, as it was in the case at bar, the placing of a bet gives rise to legally enforceable contract rights. These contract rights constitute "property," of course, and at the time which Collier identifies as "critical"--a time before anyone can know whether the bet will be successful--the property has economic value. The property is not unlike futures contracts purchased on margin. The investor in futures may win big, or his position may be wiped out, but the contractual right to a payoff if the market happens to move the right way at the right time constitutes a value reasonably equivalent to the money at risk.

The trustee's brief takes the bankruptcy court to task for making the suggestion--a suggestion characterized by the trustee as "incredible"--that gambling is arguably "an 'investment' that can have economic value . . . ." *Chomakos*,

170 B.R. at 593. But the trustee looks at the picture only as of the time when Mr. and Mrs. Chomakos left the casino "with nothing in exchange for the monies they gambled away." The time that counts is not the time when the bet is won or lost, but the time when the best is placed. The "investment" may turn out badly, but unless and until it does, the contractual right to receive payment in the event that it turns out well is obviously worth something.

Morris Communications illustrates the point nicely. At issue there was the valuation of the debtor's interest in a corporation ("C-PACT") that had only one asset--an application pending before the Federal Communications Commission for a cellular telephone license. Licenses were to be awarded at a future date under a lottery procedure. C-PACT had a chance of wining a license, but it also had a chance of losing. If the license were won, C-PACT stock would have substantial value; if the license were lost, the stock would be worthless. Before the lottery took place, the debtor sold its C-PART stock for a price negotiated at arms-length. Rejecting a claim that the price was too low, the court of appeals held that the debtor's transfer of the stock was not voidable under 11 U.S.C. § 548(a)(2)(A) and (B).

The games of chance in which Mr. and Mrs. Chomakos participated (slot machine games and blackjack) were not FCC lotteries, of course, and a casino gambler is not kept waiting for months to learn whether a particular bet is successful. The principle, however, is the same in both cases. Take blackjack, for instance. The trial record shows that a person who bets $2 at the blackjack table where Mr. Chomakos did his gambling will win $3 if he receives a blackjack. At the point in time when Mr. Chomakos placed a $2 bet, his chance of winning $3 had an economic value of C-PACT's chance of winning a cellular telephone license.

The existence of an economic value may be immaterial, however, if the dollar value of the gambler's chance of winning--augmented, perhaps, by an element of entertainment value--is not "reasonably equivalent" to the amount of money wagered. We believe that the evidence presented by Flamingo showed a reasonable equivalency here, and the trustee presented no evidence to the contrary.

The casino's evidence showed, among other things, that the gambling business in Nevada is closely regulated by the state; that this regulation extends to payout ratios for both slot machines and table games; that casinos depend on repeat business, which is encouraged by customers winning; and that competition among casinos is intense. The evidence further showed that a three dollar slot machine bet could produce a jackpot of over a million dollars, which would be paid on the spot; that in a single year, Flamingo slot machine players had more than 9,500 jackpots of $1,200 or more, in addition to many lesser jackpots; that for all the dollars deposited in all Flamingo slot machines over the course of a year, Flamingo paid out 94 percent of winnings; and that the payout ratio for the particular machines played by Mrs. Chomakos was even higher, ranging from 95.73 percent to 97.43 percent. The customer enjoys better odds at the blackjack table, moreover. Assuming the blackjack player has a fair knowledge of the game and uses good basic strategy, the evidence showed that the house advantage is only one percent or less.

The trustee disputes none of these facts and does not seriously challenge Flamingo's good faith. Looking at the situation from the standpoint of creditors, however, the trustee argues that the very existence of a house advantage, coupled with the fact that Mr. and Mrs. Chomakos ultimately lost more than they won, means that there was no reasonably equivalent economic benefit. And citing *In re Young*, 148

B.R. 886 (Bankr.D.Minn. 1992) *aff'd* 152 B.R. 939 (D. Minn. 1993), where church contributions made by an insolvent donor were held to be fraudulent conveyances, the trustee maintains that it would be anomalous for gambling losses not to be treated as fraudulent conveyances too.

As far as church contributions are concerned, the cases are in conflict. While the *Young* donor was held not to have received reasonably equivalent value, bankruptcy courts reached a contrary result in *In re Missionary Baptist Foundation of America, Inc.*, 24 B.R. 973 (Bankr.N.D.Tex. 1982), and *In re Moses*, 59 B.R. 815 (Bankr.N.D.Ga. 1986). There is no need for us to take sides in the church contribution controversy, however. Looking at the matter from the standpoint of creditors, as the trustee urges us to do, it seems reasonably clear that the intangible property rights accruing to Mr. and Mrs. Chomakos when they placed their bets differed significantly from the benefits accruing to the donors in the church contribution cases.

A debtor who contributes to a church may receive spiritual and social returns of great value to the debtor, but such returns are not likely to be of much benefit to creditors. A debtor who places a bet in a fair and lawful game of chance, on the other hand, may receive hard cash in return. On one of the days when Mrs. Chomakos played Flamingo's slot machines, for example, she had winnings of $5,000. Suppose she had won a $5,000 jackpot at the start of her visit to the casino and had stopped playing as soon as she won; the return on her "investment" would obviously have benefited her creditors.

It is true that gambling odds always favor the house, and that Mrs. Chomakos would have been almost certain to lose her $5,000 jackpot--and more--if she continued playing

long enough. On the record before us, however, we cannot say that the existence of a modest house advantage means that unsuccessful bets are fraudulent conveyances.

The trustee argues that Mr. and Mrs. Chomakos did not occupy a bargaining position equal to Flamingo's, and the gambling transactions were therefore not at arm's length. But this argument overlooks the governmental and business forces by which Flamingo was constrained. Flamingo was subject to state regulations designed to create a reasonably level playing field, and Flamingo had to compete with nearby casinos to which Mr. and Mrs. Chomakos and all other customers were free to take their business. Without reasonably generous payouts and competitive odds, Flamingo could not hope to attract the repeat customers on whom, according to the evidence, Flamingo and other casino operators depend for survival. "[T]he *quid pro quo*," as the bankruptcy court observed, "was established in the context of a state regulated business, existing in an open competitive market price responding and responsive to desires of legitimate tourists pursuing and engaging in a legal and legitimate pursuit." *Chomakos*, 170 B.R. at 592.

We are not persuaded, moreover, that we ought to evaluate the transactions at issue here solely from the standpoint of creditors. Casino patrons receive what the bankruptcy court called "psychic and other intangible values," just as patrons of a fine restaurant do, for example. *Id.* at 593. If, instead of gambling, Mr. and Mrs. Chomakos had spent $7,710 on expensive dinners, the creditors would have been no better of than they are now. Yet the trustee concedes that the restaurateur would not be liable for return of the money--and when asked at oral argument how money spent at a blackjack table differs from money spent at a dinner table, the trustee had no satisfactory answer.

The judgment affirming the decision of the bankruptcy court is **AFFIRMED**.

No. 94-1712

UNITED STATES OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: GEORGE CHOMAKOS; NIKKI CHOMAKOS,	)
Debtors	)
---	)
DAVID W. ALLARD, JR., CHAPTER 7 TRUSTEE OF THE ESTATE OF GEORGE CHOMAKOS AND NIKKI CHOMAKOS,	)
Plaintiff-Appellant,	)
v.	)ORDER)(Filed on 12/20/95)
FLAMINGO HILTON,	)
Defendant-Appellee.	)

BEFORE: NELSON and RYAN, Circuit Judges; and MCKAY,* Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

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*Hon. Monroe G. McKay, United States Circuit Judge for the Tenth Circuit, sitting by designation.

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,

Leonard Green, Clerk pe

(7)

95-1389

No. 96-

Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

In The
Supreme Court of the United States
October Term, 1996

DAVID W. ALLARD, JR., CHAPTER 7 TRUSTEE
OF THE ESTATE OF GEORGE CHOMAKOS
AND NIKKI CHOMAKOS
Petitioner,

v.

FLAMINGO HILTON,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Scott M. Mahoney, Esq.
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March 19, 1996

15 pp

QUESTION PRESENTED

1. Whether the Court of Appeals erred in affirming the District Court's affirmance of the Bankruptcy Court's finding that the debtors received fair consideration and reasonably equivalent value in exchange for monies transferred to Respondent?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Pursuant to Rule 29.1 of this Court, Respondent states that it is a corporation and that its parent company is Hilton Gaming Corporation.

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No. 96-

In The
Supreme Court of the United States
October Term, 1996

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DAVID W. ALLARD, JR., CHAPTER 7 TRUSTEE

OF THE ESTATE OF GEORGE CHOMAKOS

AND NIKKI CHOMAKOS,

Petitioner,

v.

FLAMINGO HILTON,

Respondent.

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On Petition for Writ of Certiorari

To the United States Court of Appeals

For the Sixth Circuit

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Respondent's Brief in Opposition

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

---------- ✦ ----------

Flamingo Hilton ("Respondent"), respectfully prays that this Court deny the Petition for Writ of Certiorari filed by David W. Allard, Jr., Trustee of the Estate of George Chomakos and Nikki Chomakos ("Petitioner").

---------- ✦ ----------

OPINIONS BELOW

Petitioner has correctly cited the opinions and judgments delivered in the courts below.

---------- ✦ ----------

JURISDICTION

Petitioner has accurately set forth the basis for this Court's jurisdiction.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutes cited by Petitioner, this case also involves 11 U.S.C. 548(a)(2), which provides in pertinent part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition,

> if the debtor voluntarily or involuntarily - . . .
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

---------- ✦ ----------

STATEMENT OF THE CASE

George and Nikki Chomakos (the "debtors") filed a Chapter 11 proceeding on August 2, 1990. The case was subsequently converted to Chapter 7, and Petitioner was appointed trustee. (Petitioner's Appendix 1).

This adversary proceeding arises out of the gambling activities of the debtors at the Flamingo Hilton in Las Vegas. Gambling is a legal and heavily-regulated industry in the State of Nevada and the debtors engaged in lawful gaming transactions at the Flamingo Hilton. (Petitioner's Appendix 7).

Nikki Chomakos gambled at Petitioner's casino on three known occasions prior to the bankruptcy filing - June 15, 1989, June 16, 1989 and September 11, 1989. (Petitioner's Appendix 6). Ms. Chomakos played slot machines, and won a $2000.00 jackpot on June 15, 1989, a $5000.00 jackpot on June 16, 1989 and a $2000.00 jackpot on September 11, 1989. (Petitioner's Appendix 6). Despite documented winnings of $9000.00, Ms. Chomakos claimed she

actually had a net gambling loss of $5000.00 for these three days. (Petitioner's Appendix 6).

Mr. Chomakos lost money at the casino on six separate occasions - $900.00 on July 1, 1987, $100.00 on November 1, 1987, $600.00 on January 4, 1988, $600.00 on June 20, 1988, $1400.00 on June 12, 1989 and $110.00 on April 29, 1990, for a total loss of $3710.00. (Petitioner's Appendix 6 - 7).

Petitioner considered the $8710.00 lost by the debtors to be a fraudulent conveyance, and filed an adversary proceeding seeking to recover these funds pursuant to 11 U.S.C. 548 and M.C.L.A. 566.11 et. seq. (Petitioner's Appendix 5). Following a bench trial, the Bankruptcy Court issued its Opinion. (Petitioner's Appendix 1). The Bankruptcy Court found the debtors were insolvent as of January, 1988 (Petitioner's Appendix 10) and lost $7710.00 gambling at Petitioner's casino after this date. (Petitioner's Appendix 11). However, the Bankruptcy Court found no fraudulent conveyance occurred because the debtors received reasonably equivalent value and fair consideration in exchange for the monies transferred to Petitioner.

The Bankruptcy Court's decision was affirmed by the District Court. (Petitioner's Appendix 26). The District Court's decision was affirmed by the United States Court of Appeals for the Sixth Circuit. (Petitioner's Appendix 27). Petitioner's Petition for Rehearing with

Suggestion for Rehearing En Banc was denied. (Petitioner's Appendix 36).

---------- ✦ ----------

REASONS FOR DENYING THE WRIT

1. The Opinion Below Does Not Conflict With Other Decisions.

The Court of Appeals found that placing a bet at a casino where wagering is lawful creates a legally enforceable contract right - the right to receive money in exchange for a winning bet - and that this right constitutes reasonably equivalent value. (Petitioner's Appendix 31; Petitioner's Appendix 33). Petitioner suggests this decision conflicts with those made by other circuits, citing Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995); Zahra Spiritual Trust v. United States, 910 F.2d 240 (5th Cir. 1990); and In re Treadwell, 699 F.2d 1050 (11th Cir. 1983).

Scholes held charitable gifts lack reasonably equivalent value, Id., at 759. Zahra held transfers made to a charitable trust were not made for fair consideration, Id., at 249. Treadwell held transfers made for "love and affection" were not made for reasonably equivalent value, Id., at 1051.

The case at bar is plainly distinguishable. In none of the foregoing cases did the debtor receive a contractual right to potentially receive something of value. In the instant case, the debtors received enforceable contract rights having economic value.

Petitioner also cites In re Nahas, 181 B.R. 930 (Bankr. S.D. Ind. 1994), and Hansbury v. Citibank, 128 B.R. 320 (Bankr. D. Mass. 1991). Neither case involved Section 548. Rather, they dealt with nondischargeablility of debts under 11 U.S.C. 523, Id., at 320; Nahas, supra, at 931.

2. The Fact The Debtors Lost Money Is Not Indicative Of An Absence Of Reasonably Equivalent Value Or Fair Consideration.

Petitioner suggests that since the debtors lost money gambling, they received "no economic value in exchange" for their wagers. That the debtors may have lost money on a given wagering transaction or overall is not tantamount to an absence of consideration. As the Court of Appeals correctly noted, the time for determining whether reasonably equivalent value or fair consideration existed is when the debtors placed their wagers. (Petitioner's Appendix 31). [See In re Morris Communications NC, Inc., 914 F.2d 458, 466 (4th Cir. 1990), quoting Collier on Bankruptcy Section 548.09 at p. 116 (15th ed. 1984)]. Reasonably equivalent value and fair consideration in the form of the opportunity to win money existed at the time the debtors wagered. The fact a given wager was ultimately lost does not mean the consideration did not exist in the first place.

Morris Communications aptly demonstrates that reasonably equivalent value can exist in a transaction which may ultimately bear no economic fruit. In that case, the property in question was a 26%

stock interest in a corporation whose sole asset was a cellular telephone license application, Id., at 460. At the time of the transfer, the application had no present value; "it was merely a right to participate along with 21 other applicants in the award of the non-wireline cellular license for the Charlotte-Gastonia SMSA through the 'rolling of the dice' in a lottery", Id., at 468.

According to Petitioner's position, the stock transfer in Morris Communications would be a fraudulent conveyance unless the applicant prevailed in the lottery. However, the Morris Communications court had no doubt that the transfer had value, Id., at 460. As in Morris Communications, there is no doubt the debtors received value in the case at bar.

3. The Court Below Considered The Standpoint Of Creditors.

Citing McCaslin v. Schouten, 294 Mich. 180, 186, 296 N.W. 696 (1940), petitioner states that under Michigan law, the presence or absence of fair consideration must be considered from the standpoint of creditors, and suggests the court below failed to follow this standard in making its decision.

The Court of Appeals did consider the standpoint of creditors.

> Looking at the matter from the standpoint of creditors, as the trustee urges us to do, it seems reasonably clear that the intangible property rights accruing to (the debtors) when they placed their bets differed significantly from the benefits accruing to the donors in the church contribution cases . . .

> A debtor who places a bet in a fair and lawful game of change, on the other hand, may receive hard cash in return. On one of the days when Mrs. Chomakos played Flamingo's slot machines, for example, she had winnings of $5,000. Suppose she had won a $5,000 jackpot at the start of her visit to the casino and had stopped playing as soon as she won; the return on her `investment' would obviously have benefited her creditors. (Petitioner's Appendix 34).

When the court below stated it was not persuaded that it "ought to evaluate the transactions at issue here solely from the standpoint of creditors" (Petitioner's Appendix 35), it was merely noting the absurd results which would follow if it adopted Petitioner's position that the litmus test for a fraudulent conveyance is whether creditors benefit from the transfer. For example, if instead of spending the $7710.00 on gambling, the debtors had spent this sum on expensive dinners, according to Petitioner's position, the restauranteur would be liable for return of the money as a fraudulent conveyance because the meals did not economically benefit the creditors.

From the standpoint of their creditors, the debtors received value. In fact, the debtors' gaming transactions were potentially more economically advantageous than spending money at a restaurant, because spending money at the restaurant does not afford an opportunity to win money.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be denied.

Respectfully submitted,

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March 19, 1996